

Geert Wilders' "Incitement to Discriminate" Trial

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On the 31st of October, the [trial of Dutch politician Geert Wilders](#) started before the court of first instance of The Hague, although held in a secure courtroom at Schiphol Airport. Wilders, the leader of the far-right Freedom Party (in Dutch: *Partij voor de Vrijheid*, PVV), is facing charges for his statements on people with a Moroccan background, which the prosecution claims violate two provisions in the Dutch criminal code. Wilders already faced similar charges in 2011, for which he was acquitted.

Below I will discuss the first *Wilders* trial in light of Dutch hate speech prohibitions, how the current trial may differ, the arguments of the parties thus far in light of European Court of Human Rights (ECtHR) jurisprudence, and the political ramifications.

Wilders I – The Qur'an and Fitna

In 2011, Wilders faced charges based on statements he had made over the course of 2007 and 2008. In these statements, made during interviews, published in newspapers or published online, Geert Wilders frequently compared the Qur'an to *Mein Kampf*. He further claimed that Islam is a "fascist and violent ideology" and that the 'islamization' of the Netherlands should be stopped. Finally, he created and published the film *Fitna*. In *Fitna*, Wilders depicted verses of the Qur'an which he deemed to inspire violence towards non-Muslims, paired with imagery of radical Islamists engaging in violence and hate speech, among other statements and imagery strongly critical of Islam.

Based on this, charges were pressed against Wilders for violation of artt. 137c and 137d of the Dutch Criminal Code (in Dutch: *Wetboek van Strafrecht*, Sr). Art. 137c Sr prohibits publicly and intentionally insulting a group of people based on their race or religion (among others, which were not relevant to the case). Art. 137d Sr makes it an offence to incite hatred, violence towards or discrimination of people based on their race or religion (*idem*). After a long trial, during which Wilders invoked his right of substitution of the judges multiple times (and was successful on one of those instances), Wilders was [acquitted of all charges](#). This was in line with the prosecution, which had also requested a full acquittal.

In essence, the court held that while it was proven that Geert Wilders had made the statements of which he was accused, those statements were not of a character so as to violate art. 137c and 137d Sr, in light of the freedom of expression. More specifically, the court's reasoning was two-fold:

- The majority of Wilders' statements were directed towards Islam and the Qur'an, not towards Muslims. Within the full context of the publications in which the statements were made, Wilders repeatedly emphasized this as well. As such, the court held that he had not insulted or incited discrimination of "a group of people" (§4.3.2). The Criminal Code intends to protect persons, not religions. This remains true even if Muslims in fact do feel discriminated against by his words.
- In so far as Wilders' statements were directed towards persons, they should be qualified as statements of a politician during a time when immigration and multiculturalism were a prominent part of public debate (§4.3.2). In this case, the freedom of expression should be broad. In addition, the court invoked the ECtHR [Handyside](#) ruling by holding that Wilders' freedom of expression also covers speech that offends, shocks or disturbs (§49 of *Handyside*).

Ultimately therefore, the court noted that even though Wilders' statements were on the verge of what is still acceptable under the Criminal Code, they did not cross the line.

Wilders II – "Fewer Moroccans"

On the 31st of October 2016, the second Wilders trial started. This trial concerns [statements made on 12 and 19 March 2014](#), during and after the municipality elections for The Hague. On the 12th, Geert Wilders commended the PVV electorate with voting for “a party for a safe and social city, with lower burdens and, if possible, also with fewer Moroccans”. He repeated this in stronger terms on the 19th, when he asked his supporters: “Do you want more or fewer Moroccans?” After the crowd predictably responded with “Fewer, fewer!”, Wilders answered: “Then we’ll take care of that.”

People with a Moroccan background are a prominent minority in the Netherlands. Based on the statements, charges were pressed against Wilders (through a model form) 6.474 times. However, during the first day of proceedings [it came to light](#) that not all of those are genuine charges. Some accusers said they signed the model form for solidarity reasons and not for personal feelings of discrimination. Others admitted to not understanding what they had signed, and one man thought that he was casting a vote against Wilders. Nevertheless, of the 35 accusers heard for the trial, the majority expressed personal feelings of discrimination, with one Moroccan man recounting that schoolyard bullies had taken up shouting “Fewer!” at his children.

The trial concerns the same offenses as the first *Wilders* case, artt. 137c and 137d Sr. In short: insulting a group of people and incitement to discriminate against said group. The argument of the public prosecutor is that this case differs in relevant ways from the first *Wilders* case. Most importantly, Wilders’ statements in the present case explicitly refer to a group of people, namely people of Moroccan descent. In *Wilders I*, however, an important factor of the acquittal was that Wilders distinguished between Islam and Muslims. In addition, the context in the current case is different. In particular, the statements on the 19th were made during a live victory speech rather than publications during a time of public debate, and Wilders urged the crowd to join him in his call for “fewer Moroccans”. Furthermore, the prosecution’s [accusations](#) invoke the ECtHR *Féret* case. In *Féret*, the ECtHR held that while politicians enjoy broad protection of their freedom of expression, they must also take special care to avoid speech that could incite hatred or discrimination (§75). [The prosecution holds](#) that under the current circumstances artt. 137c and 137d Sr have been violated by Wilders despite his broad freedom of expression as a politician. In doing so, it also follows a [2014 judgment](#) of the Dutch Supreme Court, in which it upheld the conviction of a minor politician found guilty of insulting and inciting discrimination towards homosexuals (Note however, that this ruling was issued only after Wilders’ statements had already been made). Finally, the state’s prerogative to protect minorities from discrimination should outweigh Wilders’ freedom of expression in this case. The prosecution maintains that based on these factors, a conviction could follow where it failed in *Wilders I*.

Geert Wilders himself has [publicly stated](#) that he will not attend his trial out of protest. Wilders believes that he faces a political trial intended to silence him and his supporters. He has said that his statements should not be subject to the opinion of the courts, but should be debated in Parliament and should be judged by the voting public in the upcoming elections. Experts called by the defence council have reiterated this as well. With this, Wilders and his defence seem to invoke the theory of the ‘marketplace of ideas’, which is a common line of thinking in United States First Amendment law. It holds that [speech should be free](#), since incorrect or offensive speech will be challenged by even stronger counterarguments so that ultimately the truth will surface. Wilders believes that a majority of the Dutch electorate agrees with him and that therefore the truth should not be silenced. His defence council has also called for experts to examine the crime rates of native Dutch versus that of people with a Moroccan background, in order to show that Wilders speaks the truth and the Netherlands really would be better off with “fewer Moroccans”. Consequently, Wilders believes his freedom of expression should prevail.

Neither party has invoked the Dutch constitution, relying instead on the ECHR or freedom of expression as a general principle. This is due to a peculiarity in Dutch constitutional law. Freedom of expression is not explicitly enshrined in the Dutch constitution, only a specific prohibition of censorship (art. 7). However, artt. 93 and 94 provide that international agreements have direct effect and overrule national law. As a result, while Wilders’ council could theoretically invoke the Dutch constitution as a defence, it is more common before Dutch courts to instead invoke the ECHR directly. This is especially true for the *Wilders* cases, as the freedom of expression of art. 10 ECHR is much more extensive than that of the Dutch constitution. It remains to be seen how the court of The Hague will weigh the relevant ECtHR case law, particularly *Féret*, in the current case, but the Dutch

constitution is unlikely to significantly impact its decision.

Towards the election

The proceedings of the current Geert Wilders case come just four months before the Dutch Parliamentary elections in March 2017. Based on [current polls](#), Wilders' PVV is expected to win a significant number of seats and even has a shot at becoming the largest party. The Netherlands public seems [divided over the trial](#), with some seeing it as Wilders clearly having crossed the line he already skirted in *Wilders I*, and others seeing a continuous attempt to silence non-politically correct speech of a politician who speaks the mind of the public.

More fundamentally, however, this case seems to hinge on two different conceptualizations of the freedom of expression. The broad 'marketplace of ideas' style to which Geert Wilders adheres versus the more constrained version favored by the prosecution, in which freedom of expression must be balanced against the rights of others and the principle of non-discrimination.

Dutch courts tend to follow the ECtHR approach to the freedom of expression, and the Dutch constitution is of limited added value in these cases. However, it remains difficult to predict how the balance in this case will ultimately be struck in light of *Wilders I*, Wilders' status as a politician and public opinion.

As of yet, the statements of a number of accusers have been read and several experts have been heard. Proceedings are expected to last for a number of weeks, and the final verdict is still a long and undoubtedly arduous time away.

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